

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 ADVOCATES FOR RESPONSIBLE
3 DEVELOPMENT,

4 Petitioner,

5 v.
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7 MASON COUNTY,
8

9 Respondent,

10 and
11

12 SHAW FAMILY L.L.C.,
13

14 Intervenor
15

Case No. 07-2-0006

**ORDER ON PETITIONER'S MOTION FOR
RECONSIDERATION**

16 THIS Matter comes before the Board upon the motion of Petitioner ARD for reconsideration
17 of the Board's August 20, 2007 Final Decision and Order in this case.¹ Intervenor filed an
18 response to the Petitioner's motion on September 6, 2007.² No response was filed by the
19 County in the time allotted under the Board's Rules of Practice and Procedure, WAC 242-
20 02-832(1).
21

22
23 **DISCUSSION**

24 **Positions of the Parties**
25

26 Petitioner asks the Board to reconsider its decision in four ways: (1) Petitioner argues the
27 Board should not have dismissed Issue 13 without prejudice; (2) Petitioner argues that the
28 Board failed to make a finding on the Petitioner's requests for invalidity; (3) Petitioner
29 alleges that it was error not to enter a determination of invalidity as to Issues 3 and 15; and
30

31 ¹ Petitioners'[sic] Motion for Reconsideration and Answer to Intervenor, August 29, 2007.

32 ² Response to Petitioner's Motion for Reconsideration and Answer to Intervenor's Motion for Reconsideration,
September 6, 2007.

1 (4) Petitioner alleges it was error for the Board to find “the minimal reasonable use”
2 exemption in MCC §17.01.150 compliant.³
3

4 Intervenor responded only with respect to Issue No. 15 since that is the only issue
5 concerning Intervenor’s property.⁴ Intervenor argues that it will “suffer a huge financial loss”
6 and this has been “totally ignored by the Board.”⁵
7

8 **Board Discussion**

9 Motions for reconsideration before the growth management hearings boards are governed
10 by the Board’s Rules of Practice and Procedure, Ch. 242-02 WAC. These rules allow
11 motions for reconsideration of a final decision:
12

13 After issuance of a final decision any party may file a motion for reconsideration with
14 a board in accordance with subsection (2) of this section. Such motion must be filed
15 within ten days of service of the final decision...
16 WAC 242-02-832(1)(in pertinent part).

17 The bases for reconsideration in the Board Rules of Practice and Procedure are:

- 18 (a) Errors of procedure or misinterpretation of fact or law, material to the party
19 seeking reconsideration;
- 20 (b) Irregularity in the hearing before the board by which such party was prevented
21 from having a fair hearing; or
- 22 (c) Clerical mistakes in the final decision and order.⁶

23 Although Petitioner did not expressly address the bases for reconsideration in the Boards’
24 Rules, Petitioner is apparently asserting errors “of procedure or misinterpretation of fact or
25 law, material to the party seeking reconsideration.”⁷
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29 ³ Petitioners’ [sic] Motion for Reconsideration and Answer to Intervenor. (There is only one petitioner remaining
30 in this case. John E. Diehl was found not to have standing in his individual capacity.)

31 ⁴ Response to Petitioner’s Motion for Reconsideration and Answer to Intervenor’s Motion for Reconsideration,

32 ⁵ Response to Petitioner’s Motion for Reconsideration and Answer to Intervenor’s Motion for Reconsideration,
September 6, 2007.

⁶ WAC 242-02-832(2)

⁷ WAC 242-02-832(2)(a).

1 The Board finds that Petitioner's argument with respect to Issue No. 13 only re-argues an
2 issue that has already been decided. As to Issue No. 14 (reasonable minimum use), in the
3 Final Decision and Order the Board found that:

4 There is simply no basis put before the Board by Petitioner on this issue for finding a
5 violation of either RCW 36.70A.060(2) or 36.70A.172(1).⁸

6
7 A motion for reconsideration is not properly an opportunity to make an argument that
8 Petitioner failed to make in its briefing. The Board will not consider such tardy arguments on
9 reconsideration.

10
11 However, as to the Petitioner's requests for invalidity determinations, the Board agrees with
12 Petitioner that it should enter findings on those issues for which the Board found
13 noncompliance in the Final Decision and Order. Petitioner made a request for such findings
14 in its opening brief; Petitioner made a request that the board find "that the challenged
15 sections of the ordinances are invalid because they interfere substantially with fulfilling GMA
16 goals."⁹

17
18 A Board may make a determination of invalidity only if it first makes a finding of non-
19 compliance with the GMA:
20

21 A board may determine that part or all of a comprehensive plan or development
22 regulations are invalid if the board:

- 23 (a) Makes a finding of noncompliance and issues an order of remand under RCW
24 36.70A.300;
25 (b) Includes in the final order a determination, supported by findings of fact and
26 conclusions of law, that the continued validity of part or parts of the plan or
27 regulation would substantially interfere with the fulfillment of the goals of this
28 chapter; and
29 (c) Specifies in the final order the part or parts of the plan or regulation that are
30 determined to be invalid, and the reasons for their invalidity.¹⁰

31 ⁸ Final Decision and Order at 41.

32 ⁹ Petitioners' Opening Brief at 16.

¹⁰ RCW 36.70A.302(1)

1 Petitioner prevailed on only three of the issues presented in this case – Issue No. 3, Issue
2 No. 4 and Issue No. 15. Conclusion of Law H addresses Issue No. 3:

3 §17.10.015(3)(B)(iii) is clearly erroneous in allowing a developer to place urban
4 densities and urban uses on rural lands, and fails to comply with RCW
5 36.70A.110(1). §17.10.015(3)(B)(iii) is clearly erroneous in allowing the densities and
6 intensities in an established LAMIRD to be extended outside the LAMIRD boundaries
7 without meeting the criteria of RCW 36.70A.070(5)(d), and fails to comply with RCW
8 36.70A.070(5)(d)(iv).

9 Petitioner argued that §17.10.015(3)(B)(iii) is inconsistent with “the GMA goal to avoid urban
10 sprawl.”¹¹ We have held that invalidity should be imposed if continued validity of the
11 noncompliant comprehensive plan provisions or development regulations would
12 substantially interfere with the local jurisdiction’s ability to engage in GMA-compliant
13 planning. See *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c (Order Finding
14 Noncompliance and Imposing Invalidity, February 13, 2004); *Skagit County Growthwatch v.*
15 *Skagit County, et al.*, WWGMHB 07-2-0002, (Final Decision and Order, August 2, 2007). In
16 order to show substantial interference under these circumstances, the Petitioner must show
17 a significant likelihood that permits would vest to an extent that would jeopardize future
18 planning.

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21 As to Issue No. 3, we do not find that Petitioner has met this burden. As we stated in the
22 Final Decision and Order:

23 The majority of LAMIRDs in Mason County are very small in size. A MDP in a rural
24 area must be at least 250 acres in size. Therefore, the likelihood of a transfer of
25 many uses and densities within a rural MDP is very slight.¹²

26
27 Under these circumstances, substantial interference with the fulfillment of Goal 2 has not
28 been shown.

29
30 As to Issue No. 4, no violation of a GMA goal was alleged. Issue No. 4 was set out as:

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32 ¹¹ Petitioners’ Opening Brief at 3.

¹² Final Decision and Order at 20.

1 By allowing administrative discretion to waive criteria for density bonuses for
2 Performance Subdivisions, does §17.60.015(B)(iii)(c)¹³ fail to comply with RCW
3 36.70A.070's requirement to maintain rural character and RCW 36.70A.110's
4 requirement to prohibit urban growth outside designated UGAs?

5 There was also no argument to support a finding of a GMA goal violation in Petitioners'
6 Opening Brief.¹⁴ Without an allegation of facts to support a finding of substantial
7 interference with a specified GMA goal, it is inappropriate for the Board to enter one on
8 reconsideration.
9

10 Finally, with respect to Issue No. 15, Petitioner has consistently asserted a violation of Goal
11 8 of the GMA – the natural resource industries goal. Issue No. 15 was set out as:

12 In rezoning land designated as LTCF [long term commercial forest] land without
13 showing that its continued use for the production of timber resources is not
14 reasonable or that it no longer satisfies the criteria for designation as LTCF land, has
15 the County in Ordinance 139-06 failed to maintain the internal consistency of its
16 Comprehensive Plan and Future Land Use Map required by RCW 36.70A.070 and
17 **does its action interfere substantially with the goal of conserving productive
18 forest lands and discouraging incompatible uses (RCW 36.70A.020(8))?**
(emphasis added)

19 Petitioner argued in its opening brief that conversion to In Holding Lands would directly
20 jeopardize adjoining designated resource lands.¹⁵ Without a sizeable setback, Petitioner
21 argued, the change to an In Holding designation poses a threat to the viability of adjoining
22 long term commercial forest (LTCF) land.¹⁶
23

24 Intervenor responds that it has a major economic interest in the designation change and
25 argues that this is an interest that must be protected under the property rights goal (RCW
26 36.70A.020(6)).¹⁷ Intervenor also argues that the affordable housing goal (RCW
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30 ¹³ It appears that this is a citation to 17.60.015(3)(B)(iii)

31 ¹⁴ See page 4.

32 ¹⁵ Petitioners' Opening Brief at 15.

¹⁶ *Ibid.*

¹⁷ Response to Petitioner's Motion for Reconsideration and Answer to Intervenor's Motion for Reconsideration at 3,

1 36.70A.020(4)) and the economic development goal (RCW 36.70A.020(5)) should also be
2 considered in this regard.¹⁸
3

4 The Board has determined that the designation and mapping change of the Shaw Family
5 property was non-compliant with the County's Comprehensive Plan policies and the criteria
6 for designation change in the Mason County Development Regulations, in violation of RCW
7 36.70A.070. In considering whether invalidity should be imposed, the Board looks to the
8 likelihood that the County's ability to come into compliance will be compromised by the
9 continuing validity of the designation and mapping change. Unfortunately, Intervenor itself
10 has provided evidence of just that risk. While this case was pending before the Board, the
11 Intervenor obtained an administrative segregation of the property in question which would
12 not have been allowed under the original LTCF designation. Further division of the property
13 now that an In Holding designation has been applied could lead to the creation of even
14 smaller parcels since parcels of one dwelling unit per five acres are allowed in an In Holding
15 designation.¹⁹ No assurance has been provided to the Board that neither the County nor
16 the Intervenor will act to pursue such divisions during the compliance period such as was
17 provided to the Board in other cases.²⁰ Without a finding of invalidity, the Intervenor may
18 continue to divide and develop LTCF land such that the County cannot act to achieve
19 compliance on the designation and mapping change. Under these circumstances, the
20 Board finds that the continued validity of the designation and mapping change of the Shaw
21 Family property through Ordinance 139-06 substantially interferes with the fulfillment of Goal
22 8, RCW 36.70A.020(8).
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31 ¹⁸ *Ibid* at 2-3.

32 ¹⁹ Exhibit 184.

²⁰ See, e.g., the representation of the Intervenor in *Futurewise v. Skagit County et al.*, WWGMHB Case No. 05-2-0012c (Final Decision and Order, September 22, 2005).

1 **Conclusion:** The Board finds no basis for an invalidity determination as to Issue Nos. 3 or
2 4. However, as to Issue No. 15, the Board will enter a determination of invalidity pursuant to
3 RCW 36.70A.302.
4

5 ORDER

6 Based on the foregoing, the Petitioner's motion for reconsideration is hereby GRANTED for
7 the entry of findings with respect to the Petitioner's invalidity requests. The Final Decision
8 and Order dated August 20, 2007 is amended as follows:
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10 The following analysis will be added to Page 48 of the Final Decision and Order of August
11 20, 2007:
12

13 "While this case was pending before the Board, the Intervenor obtained an administrative
14 segregation of the property in question which would not have been allowed under the
15 original LTCF designation. Further division of the property now that an In Holding
16 designation has been applied could lead to the creation of even smaller parcels since
17 parcels of one dwelling unit per five acres are allowed in an In Holding designation.²¹ No
18 assurance has been provided to the Board that neither the County nor the Intervenor will act
19 to pursue such divisions during the compliance period such as was provided to the Board in
20 other cases.²² Without a finding of invalidity, the Intervenor may continue to divide and
21 develop LTCF land . Such action would hinder the County's ability to conserve this land for
22 commercial timber production. Under these circumstances, the Board finds that the
23 continued validity of the designation and mapping change of the Shaw Family property
24 through Ordinance 139-06 substantially interferes with the fulfillment of Goal 8, RCW
25 36.70A.020(8)."
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31 ²¹ Exhibit 184.

32 ²² See, e.g., the representation of the Intervenor in *Futurewise v. Skagit County et al.*, WWGMHB Case No. 05-2-0012c (Final Decision and Order, September 22, 2005).

1 The following shall constitute findings of fact relating to invalidity:

2 "56. While this case was pending before the Board, the Intervenor obtained an
3 administrative segregation of the property in question which would not have been allowed
4 under the original LTCF designation.

5 57. Further division of the property now that an In Holding designation has been applied
6 could lead to the creation of even smaller parcels since parcels of one dwelling unit per five
7 acres are allowed in an In Holding designation.

8 58. The change to an In Holding designation converts designated natural resource land
9 (ong term commercial forest (LTCF)) to a non-resource use.

10 59. The change of designation and mapping from LTCF to In Holding fails to conserve
11 designated natural resource lands for natural resource industry purposes and converts them
12 to other uses."
13
14

15 The following shall be added as conclusions of law:

16 "T. The continuing validity of §17.10.015(3)(B)(iii) does not substantially interfere with
17 fulfillment of Goal 2 of the GMA, RCW 36.70A.020(2).

18 U. The Petitioner as failed to show that the continuing validity of §17.10.015(3)(B)(iii)(c)
19 substantially interferes with the fulfillment of any goal of the GMA.

20 V. The continuing validity of the amendment to the comprehensive plan map adopted in
21 Ordinance 139-06 which changes the LCTF designation of the Shaw Family LLC property to
22 In Holding substantially interferes with the fulfillment of Goal 8 of the GMA, RCW
23 36.70A.020(8)."
24
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26 All the remaining terms and conditions of the August 20, 2007 Final Decision and Order
27 shall remain in full force and effect.
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1 So Ordered this 14th day of September 2007.

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4 _____
Margery Hite, Board Member

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Holly Gadbaw, Board Member

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James McNamara, Board Member

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13 Pursuant to RCW 36.70A.300 this is a final order of the Board.

14
15 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
16 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
17 judicial review may be instituted by filing a petition in superior court according to the
18 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

19 **Enforcement.** The petition for judicial review of this Order shall be filed with the
20 appropriate court and served on the Board, the Office of the Attorney General, and all
21 parties within thirty days after service of the final order, as provided in RCW
22 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
23 but service on the Board means actual receipt of the document at the Board office
within thirty days after service of the final order.

24 **Service.** This Order was served on you the day it was deposited in the United States
25 mail. RCW 34.05.010(19)

26 **Reconsideration.** Pursuant to WAC 242-02-832(3), an order on reconsideration is not
27 subject to a motion for reconsideration.
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